

## **Summary**

### **Mitigation Banking Advisory Team**

### **December 10, 1998 Meeting**

**Advisory Members Present:** Gilbert Alvarado, City of Moses Lake; Merri Erickson, WA Cranberry Alliance; Bill Garvin, WA State Farm Bureau; Sono Hashisaki, Springwood & Associates, Inc.; Joe Mentor, Lasher, Holzpfel, Sperry & Ebberson; Kevin Noon, Critical Habitats Inc.; Paul Roberts, City of Everett; Kris Schoyen, National Audubon Society; Gail Terzi, U.S. Army Corps of Engineers; Jennifer Thomas, King County; Paul Wagner, WSDOT; Jodi Walker, Building Industry Assoc. of WA; and Bob Zeigler, WDFW.

**Advisory Members Absent:** Kathy Combs, Washington Wetlands & Mitigation Co., and Dave Morrison, The Nature Conservancy.

**Ecology Staff Present:** Lauren Driscoll, Judy Geier, Patricia Johnson, Andy McMillan, and Gordon White.

**Other Interested Parties Present:** Nancy Brennan-Dubbs, U.S. Fish and Wildlife Service; Tony Bynum, Yakima Nation; Bob Kessler, Foster Wheeler Environmental Corporation; Steve Madsen; Charlie Newling, Wetland Science Applications, Inc.; Sharon Price, U.S.DOT, Federal Highways Administration; Adrenne Quinn, Perkins and Coie; Heather Roughgarden, WSDOT; Linda Storm, U.S. EPA; and Paul Ward, Yakima Nation.

**Meeting Materials:** Agenda, draft rule development plan, guiding principles, administrative details, facilitator's role, schedule of upcoming discussion topics, and preliminary legal questions.

### **Overview**

**Meeting summaries are not word for word recordings, but are a summation of the important points, concepts, agreements, and disagreements brought out during the course of the discussions.**

Gordon White, program manager for the Shorelands and Environmental Assistance Program, thanked advisory team members for their time commitment to the process.

Andy McMillan, Ecology's wetland policy specialist, welcomed the committee and introduced Ecology's rule writing team. Lauren Driscoll represents Ecology's point of view on the team and is Ecology's technical expert. Patricia Johnson is new to Ecology and will be assisting the team as an intern. Judy Geier is new to wetlands issues, but experienced in writing rules for Ecology. She will take the lead role as the teams' facilitator and rule writer.

McMillan provided a brief legislative history of the law, Chapter 90.84 RCW, Wetlands Mitigation Banking. He noted that this is the first time in Washington State that the legislature has directly addressed and provided funding to Ecology for developing wetland regulations. The law directs Ecology to take the lead role in developing a workable system for conducting wetland mitigation banking. Ecology is developing this rule with the help of the advisory team. McMillan stressed that consensus is a critical

part of the rule development process. However, he noted that the law requires Ecology to deliver a product. In the absence of consensus, therefore, Ecology will produce a draft rule. At the end of this process, a proposal of rule language will be made and submitted to management, as well as to the public, for comment and approval.

### **Outline of Meeting Agenda**

Judy Geier began the meeting by reviewing and gaining approval of the agenda. She clarified that the objectives of the meeting were to:

- Clarify ground rules for future meetings
- Gain approval of rule development plan
- Determine if additional key issues or legal questions need to be addressed
- Identify benefits and costs of mitigation banking for the cost/benefit analysis required under rule development
- Determine pros and cons of doing an environmental impact statement

### **Administrative Details**

The team discussed how meetings would be conducted. One of the listed bullets needed clarification from the team. “*Does silence mean consent?*” The team agreed that silence does *not* mean consent. Geier asked if the facilitator may poll team members for a response of yes, no, or need more time. If more time is needed, the facilitator would ask for the member’s course of action. The team agreed with this approach.

Geier clarified the role of advisory team members versus associate members. Advisory team members were selected because of their interest, expertise, and willingness to make the time commitment to the development process. Geier stressed that meeting time was dedicated to discussions with the advisory team. She asked that associate members not participate in that discussion, but wait until the ten-minute session at the end of each agenda item, which will be open to the audience, including associates.

Geier noted that associate comments are important to the process and that there are many avenues available for providing those comments, such as: working through their representatives on the team, meeting separately with Ecology, providing written comments, and following the progress of the meetings through summaries.

Advisory team members agreed to speak for their respective constituencies and bring those viewpoints to the table. However, team members added that they may need to consult with their organizations prior to making any commitments. The team then approved the administrative details, but asked for equity in meeting locations.

### **Guiding Principles**

The team discussed the guiding principles and agreed to bullets 1 & 5. Under Bullet 2, regarding streamlining the process, the team pointed out that this should apply to the certification process for the bank, not the permitting process for projects wanting to use the banks. The team added the caveat that this principle does not mean compromising protection of resources. Under Bullet 3, the team noted that the phrase “environmentally protective” is too ambiguous. The bullet was changed to read, “*To work with the team to*

*ensure that the certification process promotes wetland mitigation banks that are ecologically sound.”* The team did not agree with Bullet 4 as it is stated. The bullet was changed to read, *“If after exhaustive effort consensus is not achieved, the advisory team will outline the different positions for Ecology to consider in the drafting of the rule.”* Ecology will, however, take the lead in developing language on the particular issue and will make that language available for public comment. Bullet 6, regarding the facilitator’s role, was changed to read that the facilitator will “*suggest*” rather than determine when the discussion “is no longer fruitful.”

## **Rule Development Plan**

### **A. Cost/ Benefit discussion**

As part of the rule development process, Ecology will be writing a cost/benefit analysis. The team was asked to help identify some of the costs and benefits of the rule process. During a brainstorming session a preliminary list of benefits was identified as follows:

- Save time and money for bank developers, applicants, and agencies
- Reduced enforcement costs for agencies
- Increased success in compensatory mitigation
- Save taxpayer money for government banking projects
- Savings to local governments who use state process
- Greater acceptance of mitigation banking as a tool
- Potential liability protection under Endangered Species Act
- Predictability and consistency between jurisdictions and watersheds
- Reduces temporal losses of wetland functions
- Helps achieve No Net Loss
- Better strategic siting and targeting of habitats
- Tool for implementing watershed plans
- Larger scale = greater potential benefit
- Financial incentive for landowners to protect, restore, and enhance wetlands
- Potential for advanced compliance if credits are not sold until bank is functioning
- Reduced oversight and compliance time for agencies
- Internal streamlining for agency review
- Reduced risk for bank developers
- Potential reduction in permitting time and money for both bank approval and use
- Economic incentive refocusing mitigation from compliance to ecological success
- Results in better mitigation, saving public money on infrastructure costs which would otherwise be needed to compensate for loss of functions from natural systems
- Creates incentive to utilize and build on mitigation knowledge to improve success
- Promotes partnerships to do environmental work
- Encourages economic development
- Increases flexibility
- Improves natural resource protection (flood, water quality, habitat)
- Improves monitoring
- Reduces costs for applicants
- Reduces costs of building housing

- Promotes acquisition of private lands into public ownership with no cost to the public
- Results in more sustainable wetlands
- Helps address takings issues by providing a reasonable use of private property
- Creates consistency of ecological restoration success criteria
- Better review and follow-through on monitoring
- Allows for programmatic approach to restoration implementation to enhance certain larger scale watershed processes
- Potential increase in education and recreation opportunities
- More productive approach to implementing restoration –efficient use of agency time
- More predictability in assessing project costs- bank credits will have a known cost
- Better application of locating mitigation sites

Costs were identified as follows:

- Agency time to certify and oversee banks
- Agency (federal, state & local) technical review time and review of existing code
- Monitoring
- Tracking
- Certification Review
- Sponsor's up-front costs
- Costs of promoting statewide banking

Team members expressed confusion concerning costs (cost =\$ or environmental costs too?). It was agreed that the cost discussion would be tabled until the January meeting when Bill Bafus, Ecology economist, will further define the cost/benefit analysis.

## B. Key Issues

The purpose of this discussion was to identify any broad issues missing from the key issues section of the rule development plan. The issues listed include those required to be addressed under Chapter 90.84 RCW as well as some recommended by agency staff. The advisory team identified the following additional issues for inclusion:

- Applicability and coordination of governmental agencies, particularly regarding tribal lands. It was suggested that an applicability section is needed to identify how, if at all, the rule applies to tribal lands. Rule language may be necessary to address the broader context of applicability as well as how the certification rule will apply to tribal lands. The Washington Department of Fish and Wildlife's Wild Salmonid Policy with Western WA Tribes was identified as a possible example of how tribal interests have been addressed in other policies.
- The Process, i.e., the hows of mitigation banking and its applicability to other land use plans, requires explanatory parameters. The following points were noted:
  1. Are timelines necessary, and if so how will timelines be addressed in the certification process?
  2. How will this process mesh with all the other plans, policies, and Acts that must be adhered to? For example:

Endangered Species Act recovery plans, and critical habitat  
Shorelines Management Act  
Watershed HB2514  
Critical Areas within the GMA  
Land Use and Water Resource Plans

3. What is the relationship between certification rule, construction permits, and the State Environmental Policy Act (SEPA) process?
  4. How will all the pieces fit together, i.e. permitting, bank construction, certification, credit purchase, and release of credits?
  5. Who will pay for this? Fee base? Is there authority in the law for certification fees?
- Content of the banking instrument will need to be further defined, such as:
    1. What does long term protection mean?
    2. What is needed or necessary from a resource protection perspective?
    3. Is the instrument subject to SEPA?
    4. Is the instrument open to appeal or review by the public?

The team agreed that two pairs of key issues, 6 & 10 and 4 & 9, have similar titles and are confusing. These titles should be changed to reflect the different content of each. The team also suggested that key issue 1 should indicate that state and federal rules must mirror each other to avoid potential problems and promote consistency and streamlining.

Ten minutes was dedicated to associates comments which are as follows:

- Will mitigation areas be an option in Washington State? How will they be handled? (Mitigation areas were defined as land specified and set-aside by a regulatory agency for mitigation projects).
- What will be the administrative process for certification? For example, how will coordination occur among those counties that already have mitigation bank rules versus those that don't?
- Who will need to sign the certification and what is the timeline for signature? Is Ecology's signature enough to certify a bank? If not, how will the necessary federal, state, and local signatures be obtained in a timely manner? What occurs if not all agencies agree to sign off or certify a bank?
- Is there state authority for making timelines for federal or local signatures?
- Can a Mitigation Banking Review Team be established with federal, state and local agencies to address coordination and timeline issues?
- Will existing restoration projects be addressed as potential banks?
- Will the state rule address "over" mitigation created by an applicant as "credits"? If so, will there be an expedited approval/certification process?
- Should federal guidance be adopted as a baseline?
- Will "in-lieu fee" be addressed as part of mitigation banking in the state rule? ("In-lieu fees" were defined as monies collected by a regulatory agency as compensation in lieu of on-the-ground mitigation. These fees are then utilized for restoration activities at a future time).

### C. Environmental Impact Statement (EIS)

Ecology is considering preparing a programmatic Environmental Impact Statement (EIS), though there is the possibility that only a Determination of Non-Significance (DNS) may be required for this rule. The team brainstormed the possible benefits of completing an EIS, which are as follows:

- Better to complete the EIS than risk violating SEPA.
- EIS would be useful in externalizing an otherwise internal process.
- EIS is another educational tool.
- The scoping document helps define the nature of the rule and its potential impacts or costs:
  - Fleshes out controversial issues and problem areas, i.e. service area size.
  - Provides an alternatives analysis.
  - Adds to public involvement process.
- EIS would document rationale for Ecology's decision-making and position, which would support the agency in a legal challenge and may help to avoid legal conflicts.

Some members of the team expressed concern that an EIS may not be the most cost effective way to achieve the same goals. Some suggested that the SEPA process is mostly procedural and not the best venue for public education or involvement. These members suggested that if public education is the goal, time and money would be more efficiently spent on involvement efforts other than an EIS.

It was noted that there was little time left in the meeting to explore issues about the certification process that would be appropriate for scoping in an EIS. Ecology was asked to return in January with a general list of alternatives and potential impacts of the mitigation bank rule.

### D. Stake Holders

Geier explained the public involvement approach described in the rule development plan as follows:

#### External Coordination and Public Involvement

- 1) Scoping brochure for potentially interested parties
- 2) General focus sheet about wetland banking and rule development process
- 3) Website will be up and running in 2-3 weeks
- 4) Planning to do presentations for organizations and constituency groups to inform them about the proposed rule.
  - National Audubon Society Spring Forum on Wetlands. DOE probably allotted 20min on the agenda for presentation.

Geier noted that Ecology will be preparing a list of trade association publications to publish notices and articles about the rule development and banking. She asked team members to contribute association names and contacts. It was advised that an expansive

list of agricultural trade associations and contacts be added to the mailing list as each type of agricultural producer may have different concerns regarding the proposed rule.

Geier noted that after the December meeting, the team's comments will be incorporated in the rule development plan. The plan will be finalized for the public file.

### **Legal Questions**

Ecology prepared a preliminary list of legal questions and asked the team if it was comprehensive enough. The team added the following:

- Include in question #6: How can procedural consistency be maintained between the National Environmental Protection Act (NEPA) and SEPA?
- Does Ecology have authority to impose a review timeline on federal and local agencies? If the agency doesn't respond within the review period, can certification be approved?
- Tribal Lands vs. Within Exterior Reservation Boundaries
  - 1) How applicable will this rule be to these areas?
  - 2) State agencies are not mandated to uphold federal treaty rights, however, federal agencies are. How will the rule address tribal interests and maintain consistency with state and federal programs?
  - 3) To maintain consistency, does the wetland mitigation banking rule need to take into account *usual and accustomed grounds and fishing areas*?

### **Dates and Locations of Future Advisory Team Meetings.**

The team agreed the next meeting will be held Wednesday, January 20, 1999, in Olympia from 9 a.m. to 3:30 p.m. February's meeting will occur Wednesday, February 24, 1999, in Olympia from 9 a.m. to 3:30 p.m. The team agreed to meet in Olympia throughout the legislative session and then move meetings to locations in Seattle or Tacoma.

### **Agenda items carried to January**

In addition to the scheduled topics, the following items will be revisited in January:

- Costs of mitigation banking rule development, and
- Scoping for EIS.